

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

1
IN COURT OF OFFICE
U.S. DISTRICT COURT, E.D.N.Y.
15 205
★

3 UNITED STATES OF AMERICA,
4 Plaintiff,

5 PM
TIME AM
CR 03-304

6 versus United States Courthouse
7 225 Cadman Plaza East
8 Brooklyn, N.Y. 11201

9 RICHARD MARTINO,

10 DEFENDANT.

11 TRANSCRIPT OF PLEA
12 Before: HON. CAROL B. AMON,
13 DISTRICT COURT JUDGE

14 APPEARANCES

15 ROSLYNN R. MAUSKOPF
16 United States Attorney - Eastern District of New York
17 One Pierrepont Plaza
18 Brooklyn, New York 11201
19 ERIC KOMITEE, ESQ.
20 THOMAS FIRESTONE, ESQ.
21 TRACY KNUCKLES, ESQ.
22 JEFFREY GOLDBERG, ESQ.
23 Assistant United States Attorneys

24 ATTORNEY FOR DEFENDANT:

25 GUSTAVE NEWMAN, ESQ.
26 BRIAN CESSERATO, ESQ.
27 FOR RICHARD MARTINO
28 Court Reporter: ALLAN R. SHERMAN, CSR, RPR
29 225 Cadman Plaza East Rm 374
30 Brooklyn, New York 11201
31 Tel: (718) 260-2529 Fax: (718) 254-7237

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32 Proceedings recorded by mechanical stenography, transcription
33 by CAT.

34 ALLAN R. SHERMAN, CSR, RPR Official Court Reporter
35 United States District Court Eastern District of New York

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1 THE COURT: Are we prepared to proceed?

2 MR. FUTERFAS: Your Honor, we had a few changes to
3 the Missouri agreement. I was on the phone with the assistant
4 United States Attorney out there as was Mr. Newman and
5 basically they have agreed to our changes and they were in the
6 process, any minute they should be faxing to your chambers
7 what should be, hopefully will be the final agreement which
8 will be the agreement that the defendants will plead to in the
9 Western District of Missouri.

10 That's where we are.

11 THE COURT: Is any mention made of those agreements?

12 MR. FUTERFAS: In this agreement? Yes, your Honor.

13 THE COURT: Let me just ask a question with respect
14 to Mr. Martino's plea.

15 The superseding --

16 MR. NEWMAN: Richard?

17 THE COURT: Yes, Richard, I'm sorry.

18 The superseding information that Richard Martino is
19 pleading guilty to covers both pending indictments, is that
20 right.

21 MR. NEWMAN: Yes, your Honor.

22 MR. KOMITEE: Yes, your Honor.

23 THE COURT: This waiver of indictment has the docket
24 number of the S-6 on it, correct?

25 MR. KOMITEE: Correct.

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1 THE COURT: Should it also have the other docket
2 number on it.

3 MR. FIRESTONE: I believe I should, your Honor. The
4 other Indictment Number is 05 CR 0021.

5 THE COURT: I suppose -- what remains to be decided
6 about the agreement in Missouri?

7 MR. NEWMAN: Just a forfeiture provision, the
8 language in the forfeiture provision in the Missouri
9 indictment, your Honor, and the reason it's significant
10 vis-a-vis this case is there is a total forfeiture in this
11 case of \$15 million of which as far as my client is concerned
12 and in connection with that \$15,000,000. 5 million
13 400 thousand of it is going to Missouri.

14 THE COURT: Is this just in this -- in this plea
15 agreement, it says 9,000,000.

16 MR. KOMITEE: Right, we reduced the amount to
17 reflect the corresponding increase in Kansas City.

18 THE COURT: Why is the reference in your agreement
19 to the Kansas City agreement?

20 MR. KOMITEE: I don't believe there is any such
21 reference.

22 THE COURT: I thought it was referenced in the
23 agreement.

24 MR. KOMITEE: We indicate in the appeal waiver on
25 page 4 that the appeal waiver is conditioned upon the sentence

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1 being 120 months or less and being ordered to run concurrently
2 to any sentence imposed in the Western District of Missouri,
3 if that is the case.

4 THE COURT: So is it envisioned that he is going to
5 enter a plea in the Western District in Missouri to --

6 MR. NEWMAN: Yes, your Honor. We are trying to
7 arrange it for next week.

8 THE COURT: Is the same thing true with regard to
9 Daniel?

10 MR. NEWMAN: Yes.

11 MR. FISCHETTI: It's our present intention to plead
12 guilty as quickly as we can, both Martinos, in Kansas City, be
13 sentenced in Kansas City, then come back here to be sentenced.

14 MR. NEWMAN: Your Honor, just to save sometime, may
15 I have a minute to speak to Mr. Fischetti and our respective
16 clients together and see if we can save some time?

17 THE COURT: Yes.

18 MR. NEWMAN: Your Honor, I think it's our consensus
19 respectively, we have had a very professional relationship
20 with the assistant in Missouri, the language that we have in
21 the forfeiture agreement, he has agreed to it. I don't
22 believe that he is going to do anything to disturb that
23 agreement and I believe that ultimately, while we are in the
24 process of taking a plea, so we don't delay you and everybody
25 else, those pages will come here and they will meet the needs

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1 that we have.

2 And what I'm saying to you in a roundabout fashion,
3 I think that we can proceed with our pleas, your Honor. I
4 don't think that anything that is going to happen in that
5 situation is going to in any way disturb this situation. I
6 have that confidence in that prosecutor in Kansas City and in
7 my colleagues to my right.

8 MS. KNUCKLES: Can I have a moment, your Honor?

9 I apologize. Can I speak to you for just one
10 moment?

11 MR. NEWMAN: Sure.

12 (Pause.)

13 THE COURT: Okay, are we ready to proceed?

14 MR. NEWMAN: Yes, we are.

15 MS. KNUCKLES: Yes, we are.

16 THE COURT: So you have an application, Mr. Newman,
17 that your client I take it waives indictment and pleads guilty
18 to the superseding information before the court?

19 MR. NEWMAN: He does, your Honor.

20 THE COURT: Mr. Martino, I'm advised by your counsel
21 that you wish to waive indictment, permit the government to
22 file a superseding information before the Court and then you
23 in turn want to plead guilty to that.

24 This is a serious decision. I have to make sure
25 that you understand all of your rights and the consequences of

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1 your plea and your waiver. I'll have to ask you questions and
2 that will require that your answers to my questions will be
3 made under oath so my courtroom deputy will swear you in.

4 (Defendant sworn.)

5 THE COURT: First matter we need to take up, Mr.
6 Martino, is waiver of indictment.

7 The government has put before the Court a
8 superseding information as I understand it that contains two
9 conspiracy charges as well it contains a fraud conspiracy,
10 wire fraud and mail fraud conspiracy as well as an extortion
11 conspiracy in two counts and it in addition has a forfeiture
12 allegation.

13 Have you read over the charges in the superseding
14 information?

15 THE DEFENDANT: Yes, I have, your Honor.

16 THE COURT: And you have discussed them with
17 counsel?

18 THE DEFENDANT: Yes, I have.

19 THE COURT: The first charge as I understand it says
20 that between '96 and '02 the defendant Richard Martino with
21 others conspired to devise a scheme and artifice to defraud.
22 It then proceeds to discuss two different schemes, one,
23 defrauding users of 800 telephone numbers in what has been
24 referred to as the cramming scheme that is defined in the
25 superseding information as well as defrauding visitors to

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1 websites for the purposes of obtaining money and property from
2 the users and visitors by means of materially false,
3 fraudulent pretenses, representations and promises and that
4 for the purpose of executing those schemes, to place and
5 caused to be placed in post offices mail to be delivered by
6 the post office and then also transmitting and causing to be
7 transmitted by means of wire communication, signs and signals.

8 It also alleges a series of overt acts in
9 furtherance of that conspiracy.

10 Count two is a separate charge, another conspiracy
11 but a very different conspiracy. This one alleges that the
12 defendant Richard Martino, with others, knowingly and
13 intentionally conspired to obstruct, delay and affect commerce
14 and the movement of articles and commodities in commerce by
15 extortion in that Richard Martino and his coconspirators
16 agreed to obtain property to wit money from Northern and
17 Shelly, a U.S. and United Kingdom publishing business with the
18 consent of the owners which consent was induced by the
19 wrongful use of actual and threatened force. And then it
20 alleges overt acts in furtherance of that conspiracy.

21 Now, as I said, it also contains a forfeiture
22 allegation.

23 This information charges two very serious felonies,
24 plus a forfeiture count. The government cannot come to court
25 and simply file a charge like this unless you agree to it.

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1 When I say serious, too, I should mention the penalties to
2 you. It's five years on each count, which means you face a
3 potential of 10 because the Court can run it consecutively,
4 three years of supervised release, which if invoked, you could
5 go back to jail for two years, a 250,000-dollar fine or the
6 greater of twice the gross gain or loss, which we, I think,
7 summarized as \$150 million, is that right?

8 MR. KOMITEE: Yes, your Honor.

9 THE COURT: Restitution, which would be also a
10 significant amount in the nature of 75,000,000 perhaps, that
11 high?

12 MR. KOMITEE: Yes, your Honor.

13 THE COURT: A hundred dollar special assessment and
14 then pursuant to your agreement, \$9 million in forfeiture.

15 MS. KNUCKLES: Point of clarification, if I may
16 your Honor. The forfeiture for Richard Martino is now going
17 to be \$9.1 million and we will make the appropriate change in
18 the agreement with initials.

19 MR. NEWMAN: No objection.

20 THE COURT: Do you understand that has been a
21 change, 9.1 million?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: So as I said, this is a very serious
24 charge. The government can't come to court and just file it
25 unless you agree to it. Otherwise, you would have a right to

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1 have the evidence presented to a Grand Jury and have a Grand
2 Jury determine whether or not the charges would be brought.
3 The government would have to persuade a majority of the
4 members of the Grand Jury that there was probable cause to
5 believe that you committed the 2 offenses.

6 If the Grand Jury found probable cause, they would
7 return the charge in the form of what is called an indictment.
8 If not, no charges would be brought. So when you waive
9 indictment, you give up the right to have the Grand Jury make
10 the determination and you say it's okay with me that the
11 government has come and filed a charge.

12 Do you understand that is what waiving indictment
13 means?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: Do you in fact wish to waive indictment?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: Anyone threatened or force you to waive
18 indictment?

19 THE DEFENDANT: No.

20 THE COURT: I accept the waiver and I will sign it.

21 Now as I said, I'm going to have to ask you a series
22 of question now that I understand that you want to enter a
23 guilty plea to this.

24 First of all, some background questions.

25 How old are you?

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1 THE DEFENDANT: 45.

2 THE COURT: How far in school did you go?

3 THE DEFENDANT: 12th grade.

4 THE COURT: Are you presently, have you recently
5 been under the care of a doctor, including a psychiatrist for
6 in I reason?

7 THE DEFENDANT: No.

8 THE COURT: This the past 24 hours, have you taken
9 any pills, drugs, medicine or alcohol of any kind?

10 THE DEFENDANT: No.

11 THE COURT: Is your mind clear as you stand here
12 today?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Mr. Newman, have you discussed the
15 question of a guilty plea with your client?

16 MR. NEWMAN: Yes, I have your Honor.

17 THE COURT: In your view, does he understand the
18 rights he is waiving by pleading guilty?

19 MR. NEWMAN: In my view, he does.

20 THE COURT: Do you have any question as all about
21 his competency to proceed today?

22 MR. NEWMAN: None at all.

23 THE COURT: Mr. Martino, have you had enough time to
24 discuss with your attorney the decision to enter a guilty plea
25 in this case?

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1 THE DEFENDANT: Yes, I have.

2 THE COURT: Are you satisfied to have him represent
3 you?

4 THE DEFENDANT: Yes.

5 THE COURT: Now, I summarized the charges a moment
6 ago. Let me ask you have you carefully read this superseding
7 information including the introduction as well as the
8 substantive counts?

9 THE DEFENDANT: Yes, I have.

10 THE COURT: Do you believe you understand the
11 charges?

12 THE DEFENDANT: Yes.

13 THE COURT: Have you had a conversation with Mr.
14 Newman where he went over what the government would have to
15 prove and by proof beyond a reasonable doubt with respect to
16 the charges?

17 THE DEFENDANT: Yes.

18 THE COURT: The first count in this indictment
19 charges mail and wire fraud conspiracies.

20 In order for the government to prove a conspiracy,
21 they have to prove a whole series of elements. They have to
22 prove that two or more persons entered into the unlawful
23 agreement to commit offense against the United States as
24 charged in the indictment, and in this case it means the mail
25 and wire fraud conspiracy. They would have to prove that you

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1 knowingly and intentionally became a member of that
2 conspiracy. They would have to prove that one of the members
3 of the conspiracy committed knowingly at least one of the
4 overt acts charged in the indictment. And fourth, they would
5 have to prove that the overt acts were committed to further
6 some objective of the conspiracy.

7 Do you understand that?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: Now, the conspiracy alleged is an
10 agreement to commit a certain offense. And in this case it's
11 mail and wire fraud. And I just wanted to then tell you what
12 the elements of mail and wire fraud are.

13 First of all, there must be a scheme or artifice to
14 defraud, to obtain money or property by false and fraudulent
15 pretenses; second, the government must prove the defendant
16 knowingly and willfully participated in the scheme to defraud
17 with knowledge of its fraudulent nature and specific intent to
18 defraud; third, the mail fraud, the government must prove that
19 in execution or in furtherance of the scheme, the use of mails
20 occurred as specified in the information. And for wire fraud
21 it must be established that the use of interstate or foreign
22 wires occurred in furtherance of the scheme.

23 Do you understand the elements of mail and wire
24 fraud?

25 THE DEFENDANT: Yes, I do, your Honor.

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1 THE COURT: As I understand, there are essentially
2 here two schemes that are charged in count one, is that
3 correct, two different schemes?

4 MR. FIRESTONE: Yes, your Honor.

5 THE COURT: And one is outlined in the introduction,
6 which is referred to as a cramming scheme. And as I
7 understand that scheme, there were advertisements for 800
8 numbers for adult entertainment services, the scheme was that
9 people would call the 800 number, there wouldn't be any free
10 entertainment services advertised. Instead, what would happen
11 when they called the phone is their phone bills would
12 automatically be charged with incurring monthly charges for a
13 voice mail service that they hadn't intended to order.

14 The scheme was able to function by the use of
15 marketing materials, that's what the consumers saw but
16 different approval materials which were shown to the
17 regulators and to the telephone companies. The scheme was
18 also perpetrated by a use of a company USP&C which was
19 referred to as a building aggregator and would cause the
20 charges to be put on the bills and delivered to the telephone
21 companies who sent the bills to individuals. It was also
22 perpetrated, the fraud, through the use of shell companies
23 that were purported service providers, the people who were
24 allegedly offering the voice mail and other services that in
25 fact had not been ordered.

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1 So do you understand that first scheme that is
2 alleged?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: Have I correctly summarized the first
5 scheme?

6 MR. KOMITEE: You have.

7 One thing that I would clarify, in this case the
8 government doesn't allege that the voice mail charges were
9 generated automatically simply as a function of the call being
10 completed. It was only after a person was induced to give
11 their name and some other identifying information or speak a
12 phrase that led to the victim being billed. But it is our
13 contention that whatever the victim indicated on the so-called
14 voice capture, it was intended that they would be billed for
15 having left a voice capture irrespective of whether they knew,
16 consented or authorized to the charges being levied.

17 MR. NEWMAN: Your Honor, may I just interrupt?

18 THE COURT: Yes.

19 MR. NEWMAN: Your Honor, it had been my
20 understanding, I believe the government's understanding, Mr.
21 Martino, since this is a two -- a conspiracy which covers two
22 particular schemes. Mr. Martino is going to plead guilty to
23 the internet scheme.

24 MR. KOMITEE: Which is fine with the government,
25 your Honor.

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1 THE COURT: I just assumed since it was a
2 superseding information.

3 MR. NEWMAN: You were on a roll so to speak and I
4 didn't want to interrupt you in the middle of your statement.

5 THE COURT: The second scheme that is alleged there,
6 Mr. Martino, is what has been referred to in the many
7 discussions and arguments that we have had in this case is the
8 internet scheme, and the government alleges that people were
9 defrauded into thinking they were getting a free tour of the
10 internet, whereas in fact they were being billed for it. And
11 the government alleges that scheme initially took place by
12 saying to the people that you have to put in your credit card
13 number to prove you were over 18 and they thought that that
14 was just for that purpose. They watched it and it came a
15 point in time where they were charged without their
16 understanding that they were going to be charged. So that is
17 the scheme that is outlined there.

18 Do you understand that.

19 THE DEFENDANT: Yes, I do.

20 THE COURT: Now, the second charge is the, what is
21 referred to as the Hobbs Act charge and again, this is a
22 conspiracy so the same elements of conspiracy that I mentioned
23 to you a moment ago would have to be proven, except this time
24 the offense is not mail fraud or wire fraud, but a Hobbs Act.

25 So the individual elements of a Hobbs Act are that

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1 the government would have to prove that a defendant wrongfully
2 obtained property of another, that the defendant obtained the
3 property with the victim's consent but that the consent was
4 compelled by the wrongful use or threat of force, violence or
5 fear; and third, that as a result of the defendant's action,
6 interstate commerce or an item moving in interstate commerce
7 was delayed, obstructed or affected in some way.

8 So do you understand the crime charged in count two?

9 THE DEFENDANT: Yes.

10 THE COURT: What I want to do now is go over the
11 rights that you have. These are rights that you give up if
12 you plead guilty.

13 First of all, you have a right to plead not guilty
14 to these charges.

15 Do you understand?

16 THE DEFENDANT: Yes.

17 THE COURT: If you plead not guilty to the charges,
18 you would have a right under the Constitution and laws of the
19 United States to a speedy and public trial before a jury with
20 the assistance of your attorney.

21 Do you understand that?

22 THE DEFENDANT: Yes, I do.

23 THE COURT: At any trial you would be presumed
24 innocent. You wouldn't have to prove that you were innocent.
25 Under our system of law, it is the government that has the

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1 burden of proof and that is proof beyond a reasonable doubt
2 that you are guilty of the crime charged. If the government
3 failed to meet that burden of proof, the jury would have the
4 duty to find you not guilty.

5 Do you understand?

6 THE DEFENDANT: Yes.

7 THE COURT: In the course of the trial, witnesses
8 for the government have to come here into court and testify in
9 your presence. Your lawyer would have the right to
10 cross-examine these witnesses. He could raise legal
11 objections to evidence the government sought to offer against
12 you and could offer evidence in your behalf.

13 Do you understand?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: At trial, you would have a right to
16 testify in your on behalf if you wanted to. On the other
17 hand, you couldn't be forced to be a witness at your trial.
18 This is because under the Constitution and laws of the United
19 States, no person can be made to be a witness against himself.
20 So if you wanted to go to trial but you chose not to testify,
21 I would tell the jury they could not hold that against you.

22 Do you understand?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: If instead of going to trial, you plead
25 guilty to the crimes charges and if I accept your guilty plea,

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1 you'll be giving up your right to a trial and all the other
2 rights I just discussed. There will be no trial in this case
3 and no right to an appeal on the question of whether you did
4 or did not commit the crime. I'll simply enter a judgment of
5 guilty based upon your plea.

6 Do you understand?

7 THE DEFENDANT: Yes, I do.

8 THE COURT: If you do plead guilty, I'm going to
9 have to ask you questions about what you did in order to
10 satisfy myself that you are guilty of this charge. You are
11 going to have to answer my questions and acknowledge your
12 guilt. This means you would be giving up your right not to
13 incriminate yourself.

14 Do you understand?

15 THE DEFENDANT: Yes, I do.

16 THE COURT: Are you willing to give up your right to
17 trial and the other rights I just discussed?

18 THE DEFENDANT: Yes, I am.

19 THE COURT: I have before me a plea agreement. This
20 one is marked Government's Exhibit 5.

21 Mr. Martino, is that your signature on the plea
22 agreement?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Does the government represent on behalf
25 of the U.S. Attorney's Office for the Eastern District that

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1 the plea agreement before the Court contains the entirety of
2 any understanding that your office has reached with this
3 defendant?

4 MR. KOMITEE: We do, your Honor.

5 THE COURT: And the only thing that is different is
6 at paragraph 1 G, instead of 9,000,000, it should be
7 9.1 million?

8 MR. KOMITEE: I think that may carry through to
9 paragraph 5 as well.

10 THE COURT: 5?

11 MR. KOMITEE: Yes, in paragraph 5,
12 the 9 million-dollar figure appears twice about halfway down
13 the paragraph, then a third time on the carryover section on
14 page 6.

15 MR. NEWMAN: Your Honor, even though we have not
16 agreed to the government's calculations of the points so to
17 speak that they propose, I think that there is an error. It
18 looks to me like a typo and that is on the count two, the
19 extortion conspiracy count. I believe that the last entry
20 plus preparation under 2B(3)(B)(ii), it should be three points
21 not four points.

22 MR. FIRESTONE: That is correct, and we corrected it
23 on Mr. Newman's copy. That leaves a base offense level --
24 adjusted offense level for that offense 27. It doesn't change
25 the overall.

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1 MR. NEWMAN: I have no quarrel with my friend to the
2 right except Mr. Newman corrected it on my copy. That is my
3 handwriting.

4 MR. FIRESTONE: All right.

5 MR. NEWMAN: It doesn't affect any of those
6 calculations but it just makes that total 27.

7 MR. FIRESTONE: That is correct, your Honor. It
8 should be three points instead of four points.

9 THE COURT: But otherwise, the government represents
10 that this agreement is the entirety of any understanding your
11 office has reached with Mr. Martino in this matter?

12 MR. KOMITEE: We do your Honor.

13 THE COURT: Is this your understanding as well Mr.
14 Newman?

15 MR. NEWMAN: Yes, it is.

16 THE COURT: Mr. Martino, did you read over this plea
17 agreement carefully.

18 THE DEFENDANT: Yes, I did.

19 THE COURT: Did you discuss it with your attorney?

20 THE DEFENDANT: Yes, I did.

21 THE COURT: Do you believe that you understand the
22 provisions in this plea agreement?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Is there anything in this plea agreement
25 that is not clear that you need explained in any further

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1 detail now?

2 THE DEFENDANT: No, I don't.

3 THE COURT: Let me just bring to your attention a
4 couple of aspects of the agreement.

5 Paragraph 4 is correct, right --

6 So it is correct that the defendant agrees not to
7 file AN appeal or otherwise challenge the conviction or
8 sentence in the event that a Court imposes a prison term of 10
9 years or below. That is in your agreement, Mr. Martino and
10 let me just explain to you quite clearly what that means.

11 If you enter a guilty plea today and you admit the
12 criminal conduct alleged in the criminal charges and if I
13 accept that, you have admitted your guilt, you can't appeal to
14 a higher court on whether you committed the crime or not.

15 That is over by your plea.

16 Do you understand that?

17 THE DEFENDANT: Yes, I do.

18 MR. KOMITEE: The appeal waiver works slightly
19 different in this agreement and in Mr. Daniel Martino's
20 agreement in the sense that its conditioned on a sentence
21 being imposed by this Court of 120 months or less and on this
22 Court's determination that that sentence should run
23 concurrently with any sentence in the Western District of
24 Missouri if there is a prior sentencing in the Western
25 District of Missouri.

1 So both of those criteria would need to be satisfied
2 for the appeal waiver to be effective.

3 THE COURT: What if he is sentenced here first?

4 MR. KOMITEE: Then your Honor would not make a
5 determination as to whether the sentence was concurrent or
6 consecutive and the appeal waiver would be effective.

7 THE COURT: As I understand it, Mr. Martino, as long
8 as this Court does two things, you can't appeal my sentence to
9 a higher court, one of which is that I don't give you a
10 sentence greater than 120 months, which I couldn't do anyway
11 because that is the maximum penalty by law under both counts.

12 MR. KOMITEE: Yes, your Honor.

13 THE COURT: And run your sentence concurrently with
14 whatever sentence you get in the Western District of Missouri.
15 So if I gave you a sentence 120 months or less and if I run
16 that sentence concurrently with whatever the judge in Missouri
17 decides to give you, then you can't appeal my sentence to a
18 higher court.

19 Do you understand that?

20 THE DEFENDANT: Yes, I do.

21 THE COURT: Anyone threaten or force you to give up
22 that appellate right that you have?

23 THE DEFENDANT: No.

24 THE COURT: I guess I don't understand this.

25 Assuming that I gave Mr. Martino 120 months but there was

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1 nothing to run it concurrent to, does he waive his right to
2 appeal or still retain his right to appeal?

3 MR. KOMITEE: The Court raises an excellent
4 question. I think when we drafted this agreement, it was the
5 collective understanding of the parties that Mr. Martino would
6 most likely seek to be sentenced in the Western District of
7 Missouri first and I think that assumption no longer holds
8 true.

9 MR. NEWMAN: I am sorry. I didn't update our
10 colleague. That plan does hold true. We do propose to go out
11 to Missouri and get sentenced first and then come back here
12 and be sentenced, which will relieve your Honor of the burden
13 while your Honor, respectfully, on the hypothetical that you
14 gave, assuming that you gave 120 months, you would say it runs
15 concurrent with the sentence of four years or whatever he got
16 in Missouri. That would abrogate Mr. Martino's right under
17 this agreement to appeal.

18 THE COURT: To appeal.

19 MR. NEWMAN: Yes, ma'am.

20 THE COURT: But if for some reason the judge there
21 decides that the judge doesn't want to do that and wants to
22 see what happens here first, anything -- the judge there isn't
23 bound to sentence him first, whoever the judge is.

24 Assuming the scenario that for whatever reason, I
25 end up sentencing him first, is there no appeal waiver?

1 MR. NEWMAN: I would believe, your Honor, if
2 your Honor were to sentence him first and say -- this is my
3 off the cuff opinion, your Honor would say --

4 THE COURT: Recommend.

5 MR. NEWMAN: Recommend that the sentence that I'm
6 now imposing is to run concurrent with any sentence that is
7 imposed in Missouri, I think that would abrogate his rights to
8 appeal.

9 That is my opinion off the cuff without doing any
10 research.

11 MR. KOMITEE: That is satisfactory to the government
12 and I think that we should ask that that understanding be made
13 part of this agreement.

14 THE COURT: Do you understand that, Mr. Martino?

15 MR. NEWMAN: May I have a minute to speak with him?

16 THE COURT: Yes.

17 (Pause.)

18 THE COURT: Do you understand that?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: I want you to understand something as
21 well, because I know just in phrasing it, your counsel, I
22 heard him make reference to my responsibilities under this
23 agreement.

24 I don't really have any responsibilities under this
25 agreement at all. I don't have to recommend that anything run

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1 concurrent or not concurrent. I can could recommend that it
2 run consecutive. The result of my making a recommendation
3 like that would be that you wouldn't waive your right to
4 appeal but I'm not bound by anything in this agreement myself
5 as the judge?

6 MR. NEWMAN: Forgive me for poor choice of words.

7 THE COURT: I just wanted to make sure that he
8 understood that.

9 Do you understand it?

10 THE DEFENDANT: Yes, I do.

11 THE COURT: Also, this is an unusual agreement to
12 some extent because it's what they refer to as a global plea
13 agreement. The government says in paragraph 21 that their
14 willingness to agree that you plead guilty to the superseding
15 information as opposed to the charges in the underlying
16 indictment is based on everybody in the case entering a plea.

17 If someone does not enter a plea, then the
18 government doesn't have to stand by this agreement and they
19 can come in and ask to vacate the plea and put you back at
20 stage one where you were before. That is the way this
21 agreement reads.

22 Do you understand that?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: However, you can't back out of the plea.
25 If they decide for instance, well, somebody didn't plead but

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1 that is okay, we're still satisfied to have Mr. Martino plead
2 to these charges under that agreement, if somebody else
3 doesn't plead, that doesn't permit you to back out of this.

4 Do you understand that?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Are there any other parts of this
7 agreement that are unusual that I should bring to his
8 attention?

9 MR. KOMITEE: I don't believe so, your Honor, but
10 let me take a quick glance through.

11 (Pause.)

12 MR. KOMITEE: No, your Honor I think that is all
13 that you brought to the defendant's specific attention.

14 THE COURT: Has the government made you a promise
15 that you believe they have made a promise to you that they
16 didn't put in this agreement?

17 THE DEFENDANT: No, your Honor.

18 THE COURT: Let me -- I mentioned it before when we
19 were talking about waiving indictment but I want to now
20 carefully go over with you what the maximum penalty is. The
21 maximum prison term on each count is five years once again
22 because the Court can sentence consecutively. That means you
23 face a maximum exposure of 10 years on the pleas to these
24 charges.

25 Do you understand that?

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1 THE DEFENDANT: Yes, I do.

2 THE COURT: There are fines here. We've been over
3 this before, but the fine is \$250,000 or twice the gain or
4 loss resulting from the offense, whichever is greater. So
5 it's the greater and the government I think estimates we said
6 150,000,000?

7 MR. KOMITEE: Yes, your Honor.

8 THE COURT: That would be somewhere in the
9 neighborhood of the maximum fine the Court could impose. The
10 Court is required to impose a restitution. If there is a
11 restitution figure that I can set within the law, I have to
12 impose restitution and the government estimates that the
13 restitution figure may be somewhere in the nature of
14 \$75 million.

15 Do you understand that.

16 THE DEFENDANT: Yes.

17 THE COURT: There are also other penalties, as I
18 mentioned before. There is a forfeiture provision attached to
19 the superseding information and I think as I mentioned to you
20 before, if I didn't, you would have a right to jury trial on
21 this forfeiture allegation as well.

22 Do you understand that?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: There has been an agreed upon amount of
25 forfeiture here of \$9.1 million, so that's what the government

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1 says is the appropriate amount of forfeiture and you and your
2 counsel agree to that and your plea agreement is very detailed
3 as to how that is going to be paid.

4 Do you understand that?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Now, there has been a discussion of
7 sentencing guidelines. In sentencing, the Court has to take
8 into account what the Sentencing Guidelines would recommend as
9 the appropriate sentence here.

10 Have you discussed sentencing guidelines with Mr.
11 Newman and how those guidelines are calculated?

12 THE DEFENDANT: Yes, I have.

13 THE COURT: The government estimates here that the
14 guidelines in this case, and I'm sure this is a factor of the
15 amount of money that they allege the fraud involved, that the
16 guidelines are so high, 121 to 151 months that they actually
17 exceed the statutory maximum.

18 Since I can't give you more than 10 years because
19 you are only pleading guilty to two five year counts, that
20 means that the guideline range would be in effect the 10 year
21 sentence as the government estimates the guideline range.

22 Do you understand that?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: Now, this guideline range that they
25 estimate which exceeds the mandatory penalty of 121 to 151

1 months, again, you have to understand that that is just an
2 estimate of the guideline range. I can't tell you for certain
3 what the guideline range will be on the date of sentence
4 because it's my responsibility to make that determination and
5 I don't have enough information now to make it.

6 I won't have that until a presentence report is done
7 which will tell me about or recommend the guideline range.
8 And if your counsel thinks it's wrong or the government thinks
9 it's wrong, all that can be raised at sentencing, but that's
10 when that determination will be finally made.

11 Do you understand that?

12 THE DEFENDANT: Yes, I do.

13 MR. NEWMAN: I want to make one observation if I
14 might.

15 THE COURT: Yes.

16 MR. NEWMAN: I know your Honor is keenly aware of it
17 but we have not agreed with this determination. This is the
18 estimate just by the government, your Honor.

19 THE COURT: All right.

20 Again, assuming that your -- as I've said about the
21 guidelines, they are advisory now. I'm not mandated to follow
22 them now as I was in the past, but they are a very important
23 consideration. They remain a very important consideration in
24 sentencing.

25 Do you understand that?

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1 THE DEFENDANT: Yes, I do.

2 THE COURT: Under the guidelines sentencing system,
3 there is no parole board or Parole Commission. What that
4 means practically is whatever sentence you do receive from the
5 Court will be pretty close to the actual amount of time you
6 spent in prison. You don't have the opportunity to appeal to
7 a parole board to get out early because there are no parole
8 boards in the federal sentencing system.

9 Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: Finally, if you enter a guilty plea
12 today, your guilty plea will stand. You can't come back to
13 court at the time of sentence and tell me now you have changed
14 your mind you want to go to trial. At that point it's too
15 late.

16 Do you understand that?

17 THE DEFENDANT: Yes, I do.

18 THE COURT: Do you have any questions then that you
19 want to ask me about the charge, your rights or anything else
20 related to this matter that might not be clear?

21 THE DEFENDANT: No, your Honor.

22 THE COURT: Mr. Newman, is there anything that you
23 want me to discuss in any further detail with your client?

24 MR. NEWMAN: There is nothing, your Honor.

25 May I just make another observation. It's not of

1 any moment but I think the record should be clear in one
2 respect. Insofar as the superseding information is concerned,
3 under count two, the various acts that are pled there,
4 influenced by the wrongful use of actual, et cetera,
5 threatened force, violence, it's pled in the conjunctive.
6 Actually, the statute doesn't read that way. The statute
7 reads in the disjunctive for, and for pleading convenience,
8 the Eastern District pled it that way. But I just want the
9 record to be clear and I think it will become apparent to
10 your Honor why I make this distinction when Mr. Martino is
11 allowed to allocute as to what he did.

12 THE COURT: Do you know any reason why your client
13 should not enter pleas of guilty to these two charges?

14 MR. NEWMAN: No.

15 THE COURT: Are you ready to plead?

16 THE DEFENDANT: Yes.

17 THE COURT: How do you plead to count one in the
18 superseding information, guilty or not guilty?

19 THE DEFENDANT: Guilty.

20 THE COURT: How do you plead to count two in the
21 superseding information, plead or not guilty?

22 THE DEFENDANT: Guilty.

23 THE COURT: Are you making these pleas of guilty
24 voluntarily and of our own free will?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: Has anyone threatened forced or
2 pressured you to plead guilty?

3 THE DEFENDANT: No, your Honor.

4 THE COURT: I understand that this is a global plea
5 which is -- everyone's plea is being excepted as conditioned
6 on everyone pleading guilty.

7 Has any defendant put any pressure on you or undue
8 pressure on you to cause you to plead guilty?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Other than the plea agreement with the
11 government and the agreement that you are reaching with the
12 Western District of Missouri, has anyone made promises to you
13 that have caused you to plead guilty?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: Has anyone promised you what sentence
16 you would receive from this Court?

17 THE DEFENDANT: No, your Honor.

18 THE COURT: Let's take the first count one first.

19 Do you want to tell me in your own words what you
20 did in connection with count one?

21 THE DEFENDANT: From 1996 to 2000, I conspired with
22 others to use the mails and wires to defraud internet
23 considers by charging them monthly recurring fees for services
24 they did not knowingly authorize through the use of free
25 tours.

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1 In furtherance of this agreement, I caused credit
2 card bills to be sent to consumers located in the Eastern
3 District of New York to be charged unauthorized monthly
4 recurring fees.

5 THE COURT: Is there one of the overt acts that
6 should be allocuted to specifically?

7 Has he allocuted to E?

8 MR. KOMITEE: He certainly has in the global sense
9 that he understands that there are telephone bills transmitted
10 -- E is the telephone bill and I think what we are talking
11 about are monthly credit card bills.

12 THE COURT: That's right.

13 Is there a J?

14 MR. NEWMAN: G, your Honor.

15 On or about March 10, 1999, Richard Martino
16 transmitted and caused to be transmitted the joint venture web
17 site YGAL.COM by means of wire communication from Lexitrans
18 Service in Kansas to a computer located in Freeport, New York.

19 THE COURT: Did you do that, Mr. Martino, what Mr.
20 Newman just read?

21 THE DEFENDANT: Yes.

22 THE COURT: How was that in furtherance in the
23 scheme?

24 THE DEFENDANT: Because that URL had the free tours
25 on it that made the people put their credit card in to be

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1 billed unauthorized.

2 THE COURT: So was that sent there for the purposes
3 of putting it up on the internet, is that why it was sent to's
4 Lexitran?

5 THE DEFENDANT: Yes.

6 THE COURT: So this could put it up on the internet?

7 THE DEFENDANT: Yes.

8 THE COURT: An that was one of the fraudulent free
9 tour sites?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: So you sent that out, caused that to be
12 transmitted by wire communication then in March 10, 1999 from
13 Lexitran Service in Kansas to a computer in Freeport?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Does the government think that I need a
16 further allocution with respect to count one?

17 MR. KOMITEE: No, your Honor, we think that is
18 sufficient.

19 We believe it's sufficient, your Honor.

20 THE COURT: Mr. Newman, do you believe it's
21 factually sufficient?

22 MR. NEWMAN: I believe that it's factually
23 sufficient, your Honor.

24 THE COURT: Let's turn to count two.

25 Could you tell me in your own words, Mr. Martino,

1 what you did in connection with the crime charged in count two
2 which -- first of all, before we go there, there is something
3 that I want to raise. Mr. Newman. I understand in connection
4 with count two, your client is waiving any claim of statute of
5 limitations?

6 MR. NEWMAN: Yes, he is.

7 THE COURT: You could raise an argument, Mr.
8 Martino, with respect to count two that the government waited
9 too long to charge you with this offense because this occurred
10 back in '93. The government would have five years, I believe,
11 to bring this.

12 MR. FIRESTONE: Correct, your Honor.

13 THE COURT: Which would have been in 1998.

14 You could raise as a defense to this what we call
15 the statute of limitations which would preclude the government
16 from charging you with this offense at this time.

17 Do you understand that?

18 THE DEFENDANT: Yes, I do.

19 THE COURT: Now, I've been given to understand both
20 in reading over your plea agreement and from your lawyer that
21 you are willing to waive that defense and to proceed to enter
22 a plea, in other words, to give up the claim of that statute
23 of limitations defense and plead guilty. Is that correct?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: And Mr. Newman, this is something you've

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1 discussed with your client?

2 MR. NEWMAN: I have.

3 THE COURT: And I take it that the decision to do
4 that was in a way a strategic decision that was worked out in
5 connection with the disposition of the case?

6 MR. NEWMAN: And to further his interests.

7 THE COURT: Do you want to tell me what you did in
8 connection with what is charged in that count.

9 THE DEFENDANT: Yes, your Honor.

10 In 1992, I conspired with another to obtain through
11 the use of threatened economic harm property from Richard
12 Desmond in an amount greater than that which he had
13 fraudulently induced me to pay to his company in
14 furtherance --

15 THE COURT: You are going to have to read that to me
16 again. I missed the import of that.

17 THE DEFENDANT: In 1992, I conspired with another to
18 obtain through the use of threatened economic harm, property
19 from Richard Desmond in an amount greater than that which he
20 had fraudulently induced me to pay his company. In
21 furtherance of this agreement, I met with Desmond and
22 threatened him with -- in furtherance of this agreement, I met
23 with Desmond in London, England and threatened him with
24 economic harm should he or his company attempt to engage in
25 business in the United States.

1 THE COURT: Have you done the research on this? Is
2 economic harm sufficient to meet the elements that -- the
3 pattern jury instruction that I just read doesn't refer to
4 that.

5 MR. NEWMAN: It absolutely is. I've done it before
6 and economic harm is a basis of a Hobbs Act violation.

7 MR. FIRESTONE: That is our position as well,
8 your Honor. The statute specifically refers to -- defines
9 extortion as obtaining property through wrongful use of actual
10 or threatened force, violence or fear, and in this case the
11 fear that I believe Mr. Martino has allocuted he was
12 attempting to instill fear of economic harm in Mr. Desmond
13 should Mr. Desmond ever attempt to do business in the United
14 States again.

15 So it's our position that would be satisfactory.

16 THE COURT: And what is the overt act that Mr.
17 Martino pled to?

18 MR. FIRESTONE: He has already essentially allocuted
19 to overt act B which is the meeting in London at which he
20 threatened to damage Mr. Desmond's business if Desmond ever
21 attempted to do business again in the United States.

22 I believe that was his allocution.

23 MR. NEWMAN: I think that he also satisfied it with
24 overt act A and B.

25 THE COURT: What is the venue here?

1 MR. FIRESTONE: Pursuant to the plea agreement the
2 defendant has agreed to waive any challenge to venue on this
3 count.

4 I also understand, perhaps Mr. Martino will allocute
5 to this, in order to get to London, he traveled through the
6 Eastern District of New York.

7 At any rate, he has agreed to waive any venue
8 challenge on this.

9 MR. NEWMAN: Mr. Firestone is right, in addition to
10 which some of the conversation may very well have taken place
11 that led to the conspiracy may have taken place in Long
12 Island.

13 THE COURT: You indicated that you went to a meeting
14 in London where you threatened this individual with economic
15 harm, is that correct?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: And did you fly out of Kennedy Airport
18 to go to that meeting?

19 THE DEFENDANT: Yes, I did.

20 THE COURT: Do you think we need to ask anything
21 further?

22 MR. FIRESTONE: No, your Honor.

23 THE COURT: Mr. Newman, do you think that the
24 allocution is sufficient for that count?

25 MR. NEWMAN: Yes, I do, your Honor.

1 THE COURT: What is the effect on interstate
2 commerce?

3 MR. FIRESTONE: Your Honor, as I understand it, the
4 dispute between Mr. Martino and Mr. Desmond related to the
5 placement of certain advertisements in Mr. Desmond's
6 publication in England. Mr. Desmond has specified he ran this
7 publishing business, Northern and Shell, and the effect on
8 interstate commerce was that if there was a threat of economic
9 harm to this business not to do business in the United States,
10 that obviously had an effect on interstate commerce.

11 THE COURT: And Desmond was the person who was
12 threatened, Mr. Martino?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And it was in connection with this
15 Northern and Shell business?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Based on the information given to me, I
18 find that the defendant is acting voluntarily and that he
19 fully understands the charges, his rights and the consequences
20 of his pleas and there are a factual basis for the pleas, so
21 I'll accept the pleas.

22 MR. NEWMAN: Two other requests, if I might.

23 Number 1, that bail be continued. Number 2, I think
24 with the consent of my colleagues to the right or at least
25 silence, I would ask that the bracelet be removed. Any

1 situation that anybody had envisioned before has now been
2 overcome.

3 MR. FIRESTONE: Your Honor, we don't oppose the
4 second application. As the Court will remember, our
5 application for the bracelet was with the pending trial, Mr.
6 Martino might attempt to influence witnesses or jurors. And
7 given the trial is no longer an issue, we don't oppose the
8 application.

9 MR. NEWMAN: One other observation. There was a
10 period of time where Mr. Martino faced more Draconian
11 penalties in the indictment here and in the Western District
12 of Missouri and he made every appears he was required to make.
13 And as your Honor knows, Pretrial Services at one time made an
14 application on their own to have him removed from the
15 necessity of reporting.

16 All I'm asking is that they remove the bracelet so
17 that he can return to a normal relationship with his children
18 and we don't have to bombard your Honor with applications.

19 THE CLERK: Sentencing May 20 at 11:30.

20 MR. NEWMAN: As I'm sure your Honor noticed from the
21 plea agreement, we have until the end of June to meet our
22 requirements insofar as the forfeiture is concerned. We have
23 real property that must be sold.

24 Can I ask your Honor for two considerations. May we
25 make the sentence convenient to your Honor some date after

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1 June 30th so that we can at least be assured that we can meet
2 our responsibilities under the forfeiture?

3 THE COURT: You know now you can't do that by that
4 time?

5 MR. NEWMAN: I don't, and it's further complicated
6 by the need to go out and be sentenced in -- take a plea in --

7 THE COURT: Why don't we just leave this as the date
8 and if there is a need to adjourn it.

9 THE CLERK: Friday, May 20th at 11:30.

10 MR. NEWMAN: Thank you, your Honor.

11 (Matter concluded.)

12

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14 THIS IS TO CERTIFY THAT THE FOREGOING
15 IS A TRUE AND ACCURATE TRANSCRIPTION
16 OF THE ORIGINAL STENOGRAPHIC NOTES.

17 
18 ALLAN R. SHERMAN, CSR, RPR
Official Court Reporter

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